

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

OPEN SOCIETY JUSTICE INITIATIVE,

Plaintiff,

v.

Civil Action No. _____

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
CENTERS FOR DISEASE CONTROL AND
PREVENTION,
FOOD AND DRUG ADMINISTRATION,
NATIONAL INSTITUTES OF HEALTH,
NATIONAL INSTITUTE OF ALLERGY
AND INFECTIOUS DISEASES,
DEPARTMENT OF HOMELAND
SECURITY, and
FEDERAL EMERGENCY MANAGEMENT
AGENCY,

Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF

INTRODUCTION

1. This case is about the public’s right, under the Freedom of Information Act (“FOIA”), to access records critical for assessing the government’s response to the COVID-19 pandemic. Today, the United States has the largest number of reported COVID-19 cases in the world. In contrast to several countries in Europe and Asia where infections are declining, in the U.S., the pandemic is resurging. Over 162,000 people in the United States have died of the disease, over 5 million are infected, and these numbers are projected to rise in the coming months.¹

¹ Centers for Disease Control and Prevention, *Coronavirus Disease 2019: Cases in the US* (Aug. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

Defendants have failed to comply with their obligations under FOIA and obstructed the public's access to vital information about the government's competence to combat the virus and protect lives.

2. Accordingly, this is an action under FOIA, 5 U.S.C. § 552, seeking injunctive relief to compel Defendant Department of Health and Human Services ("HHS") and its Office of Global Affairs ("OGA"), Office of the Assistant Secretary for Preparedness and Response ("ASPR"), Office of the Surgeon General ("OSG"), and Public Health Service ("PHS") (collectively, "HHS and its Components"), HHS agency, Defendant Centers for Disease Control and Prevention ("CDC"), HHS agency, Defendant Food and Drug Administration ("FDA"), HHS agency, Defendant National Institutes of Health ("NIH") and Defendant National Institute of Allergy and Infectious Diseases ("NIAID"), Defendant Department of Homeland Security ("DHS") and its agency, Defendant Federal Emergency Management Agency ("FEMA"), to immediately release records responsive to Plaintiff's FOIA requests regarding the timing and substance of the Executive Branch's response to the COVID-19 pandemic.

3. Plaintiff brings this action because the statutory time limit for action has passed, but Defendants have neither issued final determinations on Plaintiff's requests nor disclosed any responsive records.

JURISDICTION AND VENUE

4. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) because Plaintiff's principal place of business is in this district.

PARTIES

5. The Open Society Justice Initiative (“OSJI”) is a public interest law center dedicated to upholding human rights and the rule of law through litigation, advocacy, research, and technical assistance. It is part of the Open Society Institute, a tax-exempt, non-partisan, not-for-profit organization headquartered in New York City. OSJI is a “person” within the meaning of 5 U.S.C. § 551(2). Disseminating information is among OSJI’s core activities. OSJI maintains a website, <http://www.justiceinitiative.org>, through which it disseminates publications, articles, and multimedia files relating to its mission. It also directly distributes hard copies of publications and disseminates information through quarterly email newsletters, blogs, Twitter, Facebook, and other media.

6. Defendant HHS is an “agency” within the meaning of 5 U.S.C. § 552(f)(1) and is therefore subject to FOIA. OGA, ASPR, OSG, and PHS are components of HHS. HHS and its Components have possession and control over some or all of the requested records.

7. Defendant CDC is an “agency” within the meaning of 5 U.S.C. § 552(f)(1) and is therefore subject to FOIA. CDC is also an agency of HHS. CDC has possession and control over some or all of the requested records.

8. Defendant FDA is an “agency” within the meaning of 5 U.S.C. § 552(f)(1) and is therefore subject to FOIA. FDA is also an agency of HHS. FDA has possession and control over some or all of the requested records.

9. Defendant NIH is an “agency” within the meaning of 5 U.S.C. § 552(f)(1) and is therefore subject to FOIA. NIH is also an agency of HHS. NIH has possession and control over some or all of the requested records.

10. Defendant NIAID is an “agency” within the meaning of 5 U.S.C. § 552(f)(1) and

is therefore subject to FOIA. NIAID is also an agency of HHS and part of NIH. NIAID has possession and control over some or all of the requested records.

11. Defendant DHS is an “agency” within the meaning of 5 U.S.C. § 552(f)(1) and is therefore subject to FOIA. DHS has possession and control over some or all of the requested records.

12. Defendant FEMA is an “agency” within the meaning of 5 U.S.C. § 552(f)(1) and is therefore subject to FOIA. FEMA is also an agency of DHS. FEMA has possession and control over some or all of the requested records.

STATEMENT OF FACTS

13. The earliest known case of COVID-19 (the disease caused by what is now known as SARS-CoV-2) reportedly can be traced back to November 17, 2019, in Hubei province, China.² By December 31, 2019, health officials in Wuhan posted a notice that they were investigating an outbreak of pneumonia in the city, and the World Health Organization (“WHO”) acknowledged that on that date it “was informed of a cluster of cases of pneumonia of unknown cause.”³ As of January 3, 2020, Chinese authorities reported to the WHO a total of 44 patients with pneumonia of unknown etiology.⁴

14. Media reports provide varying accounts of when the Executive Branch first

² Helen Davidson, *First Covid-19 case happened in November, China government records show*, The Guardian (Mar. 13, 2020), <https://www.theguardian.com/world/2020/mar/13/first-covid-19-case-happened-in-november-china-government-records-show-report>.

³ Wuhan Municipal Health Commission on the current situation of pneumonia in our city (*translated from Mandarin*), Dec. 31, 2019, *available at* <http://www.wuhan.gov.cn/front/web/showDetail/2019123108989>; World Health Organization, Coronavirus disease (COVID-2019) R&D, *available at* <https://www.who.int/blueprint/priority-diseases/key-action/novel-coronavirus/en/>.

⁴ World Health Organization, *Pneumonia of unknown cause – China* (Jan. 5, 2020), <https://www.who.int/csr/don/05-january-2020-pneumonia-of-unkown-cause-china/en/>.

received notice of what is now known as SARS-CoV-2. According to the *Washington Post*, on January 3, 2020, a Chinese official informed CDC Director Robert Redfield of the outbreak of a respiratory illness in the city of Wuhan.⁵ Redfield relayed the report to HHS Secretary Alex Azar who reportedly relayed it to the White House.⁶

15. Although the Executive Branch has publicly promised transparency, the White House reportedly ordered federal health officials to treat top-level coronavirus meetings as classified to keep meeting participation low and minimize leaks.⁷ Classification prevented relevant officials from attending the meetings because they did not possess the requisite security clearances.⁸

16. On January 21, 2020, the CDC publicly confirmed the first U.S. novel coronavirus case, what is now known as SARS-CoV-2, in the state of Washington.⁹ On January 29, 2020, the White House announced the formation of “a coronavirus task force,” while noting that “[t]he risk of infection for Americans remains low.”¹⁰ On January 30, 2020, the WHO declared the outbreak

⁵ Yasmeen Abutaleb et al., *The U.S. was beset by denial and dysfunction as the coronavirus raged*, Wash. Post (Apr. 4, 2020), <https://www.washingtonpost.com/national-security/2020/04/04/coronavirus-government-dysfunction>.

⁶ *Id.*

⁷ Aram Roston & Marisa Taylor, *Exclusive: White House told federal health agency to classify coronavirus deliberations – sources*, Reuters (Mar. 11, 2020), <https://www.reuters.com/article/us-health-coronavirus-secrecy-exclusive/exclusive-white-house-told-federal-health-agency-to-classify-coronavirus-deliberations-sources-idUSKBN20Y2LM>.

⁸ *Id.*

⁹ Centers for Disease Control and Prevention, *First Travel-related Case of 2019 Novel Coronavirus Detected in United States* (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

¹⁰ White House, *Statement from the Press Secretary Regarding the President’s Coronavirus Task Force* (Jan. 29, 2020), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-presidents-coronavirus-task-force/>.

a “Public Health Emergency of International Concern.”¹¹ Hours after that declaration, President Trump said during a speech on trade at a Michigan manufacturing plant that the virus was “going to have a very good ending for us. So that I can assure you.”¹²

17. The WHO began supplying diagnostic test kits to various countries in January, but the United States opted not to use that test, choosing to develop its own.¹³ Contrary to an April 2018 agreement between the CDC and three of the biggest associations involved in lab testing, the Executive Branch reportedly prevented non-government laboratories from assisting in testing.¹⁴ The CDC released a flawed test in February 2020 that took weeks to correct.¹⁵

18. The Executive Branch has responded disparately to state governors’ requests for drugs, medical supplies and equipment, prompting questions about whether politics influenced their allocation across states.¹⁶

19. Since January 2020, President Trump has repeatedly downplayed the threat posed by the novel coronavirus.¹⁷ On January 22, President Trump said he was not worried about a

¹¹ World Health Organization, *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)* (Jan. 30, 2020), [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

¹² Caitlin Oprysko, *Trump: Coronavirus will have ‘a very good ending for us’* Politico (Jan. 30, 2020), <https://www.politico.com/news/2020/01/30/trump-close-cooperation-china-coronavirus-109701>.

¹³ Donald McNeil, *Did Federal Officials Really Question W.H.O. Tests for Coronavirus?*, N.Y. Times (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/health/coronavirus-tests-who.html>.

¹⁴ Bob Ortega et al., *How the government delayed coronavirus testing*, CNN (Apr. 9, 2020), <https://www.cnn.com/2020/04/09/politics/coronavirus-testing-cdc-fda-red-tape-invs/index.html>.

¹⁵ *Id.*

¹⁶ Toluse Olorunnipa et al., *Governors plead for medical equipment from federal stockpile plagued by shortages and confusion*, Wash. Post (Mar. 31, 2020), https://www.washingtonpost.com/politics/governors-plead-for-medical-equipment-from-federal-stockpile-plagued-by-shortages-and-confusion/2020/03/31/18aadda0-728d-11ea-87da-77a8136c1a6d_story.html.

¹⁷ David Leonhardt, *A Complete List of Trump’s Attempts to Play Down Coronavirus*, N.Y. Times (Mar. 15, 2020),

pandemic, stating, “We have it totally under control It’s one person coming in from China, and we have it under control. It’s going to be just fine.”¹⁸ On January 24, President Trump tweeted that the “United States greatly appreciates [China’s] efforts and transparency,” and “[i]t will all work out well.”¹⁹ On February 7, 2020, he tweeted that “as the weather starts to warm . . . the virus hopefully becomes weaker, and then gone.”²⁰ On February 10, he stated at a New Hampshire rally, “looks like, by April, you know, in theory, when it gets a little warmer, it miraculously goes away.”²¹ On February 24, he tweeted that “[t]he Coronavirus is very much under control in the USA.”²² On March 7, President Trump stated that “anybody that needs a test gets a test. We – [t]hey’re there. They have the tests. And the tests are beautiful.”²³

20. In March 2020, Jared Kushner, President Trump’s son-in-law and senior adviser, reportedly created his own team of government allies and private industry representatives to work alongside the official coronavirus task force.²⁴ Kushner’s outside advisers were reportedly

<https://www.nytimes.com/2020/03/15/opinion/trump-coronavirus.html>.

¹⁸ Matthew J. Belvedere, *Trump says he trusts China’s Xi on coronavirus and the US has it ‘totally under control’*, CNBC (Jan. 22, 2020), <https://www.cnbc.com/2020/01/22/trump-on-coronavirus-from-china-we-have-it-totally-under-control.html>.

¹⁹ Donald J. Trump (@realDonaldTrump), Twitter (Jan. 24, 2020, 4:18 PM), <https://twitter.com/realdonaldtrump/status/1220818115354923009>.

²⁰ Donald J. Trump (@realDonaldTrump), Twitter (Feb. 7, 2020, 5:31 AM), <https://twitter.com/realdonaldtrump/status/1225728756456808448>.

²¹ David Leonhardt, *A Complete List of Trump’s Attempts to Play Down Coronavirus*, N.Y. Times (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/opinion/trump-coronavirus.html>.

²² Donald J. Trump (@realDonaldTrump), Twitter (Feb. 24, 2020, 4:42 PM), <https://twitter.com/realdonaldtrump/status/1232058127740174339>.

²³ White House, *Remarks by President Trump After Tour of the Centers for Disease Control and Prevention, Atlanta, GA* (Mar. 6, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-tour-centers-disease-control-prevention-atlanta-ga/>.

²⁴ Yasmeen Abutaleb et al., *Kushner coronavirus team sparks confusion, plaudits inside White House response efforts*, Wash. Post (Mar. 18, 2020), <https://www.washingtonpost.com/politics/kushner-coronavirus-team->

emailing large groups of government employees from private email addresses.²⁵ Kushner reportedly was also the White House “point person” for “Project Airbridge,” which purports to work with private companies to bring medical supplies from other countries to the United States.²⁶

21. During his March 19 coronavirus briefing, President Trump suggested that the drugs chloroquine and hydroxychloroquine were a possible “game changer” for treating COVID-19,²⁷ despite insufficient evidence of their efficacy.²⁸ A few days later, a man died and his wife was hospitalized after the couple ingested a form of chloroquine.²⁹

22. On April 3, 2020, President Trump reversed previous guidance on masks while announcing that people in the U.S. should wear face coverings in public to slow the spread of what is now known as SARS-CoV-2.³⁰ On April 14, contrary to his previous praise for China’s “efforts

sparks-confusion-plaudits-inside-white-house-response-efforts/2020/03/18/02038a16-6874-11ea-9923-57073adce27c_story.html.

²⁵ *Id.*

²⁶ Kathryn Watson, *What is Project Airbridge?*, CBS News (Mar. 30, 2020), <https://www.cbsnews.com/news/coronavirus-what-is-project-airbridge/>.

²⁷ White House, *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing* (Mar. 19, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-6/>.

²⁸ Charles Ornstein, *What We Know — and Don’t Know — About Possible Coronavirus Treatments Promoted by Trump*, Politico (Mar. 29, 2020), <https://www.propublica.org/article/what-we-know-and-dont-know-about-possible-coronavirus-treatments-promoted-by-trump>; see also Michael Crowley et al., *Ignoring Expert Opinion, Trump Again Promotes Use of Hydroxychloroquine*, N.Y. Times (Apr. 5, 2020), <https://www.nytimes.com/2020/04/05/us/politics/trump-hydroxychloroquine-coronavirus.html>; Peter Baker et al., *Trump’s Aggressive Advocacy of Malaria Drug for Treating Coronavirus Divides Medical Community*, N.Y. Times (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/coronavirus-trump-malaria-drug.html>.

²⁹ Scott Neuman, *Man Dies, Woman Hospitalized After Taking Form Of Chloroquine To Prevent COVID-19*, NPR (Mar. 24, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/24/820512107/man-dies-woman-hospitalized-after-taking-form-of-chloroquine-to-prevent-covid-19>.

³⁰ Lena Sun & Josh Dawsey, *New face mask guidance comes after battle between White House and CDC*, Wash. Post (Apr. 4, 2020), <https://www.washingtonpost.com/health/2020/04/03/white-house-cdc-turf-battle-over-guidance-broad-use-face-masks-fight-coronavirus/>.

and transparency,”³¹ President Trump announced that he had instructed the Executive Branch to suspend funding to the WHO because it “willingly took China’s assurances to face value” and “pushed China’s misinformation.”³²

23. On April 16, 2020, after the White House released nonbinding guidelines recommending how and when states and localities should begin to reopen parts of the economy, President Trump stated that governors could reopen businesses by May 1 or earlier if they believed it prudent.³³ On April 22, 2020, Dr. Rick Bright, former director of HHS Biomedical Advanced Research and Development Authority and ASPR deputy assistant secretary, said that he was dismissed from his positions and transferred to the NIH after he pressed for rigorous vetting of hydroxychloroquine, the drug embraced by President Trump for treating the virus.³⁴

24. On April 23, 2020, President Trump suggested at a White House briefing that an “injection inside” the human body with a disinfectant could help combat COVID-19.³⁵ The same day, the Environmental Protection Agency issued a press release warning against ingesting disinfectants or applying them on the human body.³⁶ The day after the President suggested that a

³¹ Donald J. Trump (@realDonaldTrump), Twitter (Jan. 24, 2020, 4:18 PM), <https://twitter.com/realdonaldtrump/status/1220818115354923009>.

³² White House, *Remarks by President Trump in Press Briefing* (Apr. 14, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-press-briefing/>.

³³ Peter Baker & Michael D. Shear, *Trump Says States Can Start Reopening While Acknowledging the Decision Is Theirs*, N.Y. Times (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/us/politics/coronavirus-trump-guidelines.html>.

³⁴ *A doctor says he was removed from his federal post after pressing for rigorous vetting of treatments embraced by Trump*, N.Y. Times (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/us/coronavirus-live-coverage.html#link-652aa9c3>.

³⁵ White House, *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing* (Apr. 23, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-31/>.

³⁶ Environmental Protection Agency, *EPA provides critical information to the American public about safe*

disinfectant injection could counter the virus, New York City's poison control center reported receiving a higher-than-normal number of calls, many of them relating to exposure to disinfectants.³⁷

25. On June 20, 2020, President Trump hosted a rally in Tulsa, Oklahoma, despite concerns about rising numbers of coronavirus cases in the area and concerns about the event becoming a "super-spreader."³⁸ At the rally, President Trump referred to widespread testing as a "double-edged sword."³⁹ He added: "When you do testing to that extent, you're gonna find more people, you're going to find more cases. So I said to my people, 'slow the testing down, please.'"⁴⁰

26. As of August 11, 2020, there are over 5 million confirmed cases of COVID-19 in the U.S. and over 162,000 have died of the disease in the U.S.⁴¹ The CDC projects that by August 29, 2020, there will be between 175,000 and 190,000 reported COVID-19 deaths in the U.S.⁴²

27. As the U.S. braces for a "second wave" of the virus, public debate about the

disinfectant use (Apr. 23, 2020), <https://www.epa.gov/newsreleases/epa-provides-critical-information-american-public-about-safe-disinfectant-use>.

³⁷ Jason Slotkin, *NYC Poison Control Sees Uptick In Calls After Trump's Disinfectant Comments*, NPR (Apr. 25, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/25/845015236/nyc-poison-control-sees-uptick-in-calls-after-trumps-disinfectant-comments>.

³⁸ Dareh Gregorian, *Trump supporters crowd Tulsa ahead of Saturday rally*, NBC News (June 18, 2020), <https://www.nbcnews.com/politics/2020-election/trump-supporters-crowd-tulsa-ahead-saturday-rally-n1231454>.

³⁹ *Trump urges slowdown in COVID-19 testing, calling it a 'double-edge sword'*, Reuters (June 21, 2020), <https://www.reuters.com/article/us-health-coronavirus-trump-testing/trump-urges-slowdown-in-covid-19-testing-calling-it-a-double-edge-sword-idUSKBN23S0B4>.

⁴⁰ *Id.*

⁴¹ Centers for Disease Control and Prevention, *Coronavirus Disease 2019: Cases in the US* (Aug. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁴² Centers for Disease Control and Prevention, *Coronavirus Disease 2019: Forecasts of Total Deaths* (Aug. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/forecasting-us.html>.

administration's response (or lack thereof) to the disease continues unabated.⁴³ Already, COVID-19 infections have surged in parts of the country this summer while President Trump insisted that the outbreak "will go away like things go away."⁴⁴ On August 4, President Trump stated, "You know there are those that say you can test too much" and claimed the COVID-19 outbreak was "under control as much as you can control it."⁴⁵ When asked about the fact that the United States was averaging over 1,000 deaths per day in the same interview, President Trump responded, "it is what it is."⁴⁶

28. The immediate release of the requested records is critical for the public to evaluate the administration's response to the pandemic.

PLAINTIFF'S FOIA REQUESTS

29. On April 27, 2020, Plaintiff submitted FOIA requests to Defendant NIAID and Defendant NIH regarding COVID-19. These requests are incorporated by reference and attached as Exhibit A (NIAID) and Exhibit B (NIH).

30. On May 1, 2020, Plaintiff submitted a FOIA request to Defendant FDA regarding COVID-19. That request is incorporated by reference and attached as Exhibit C.

⁴³ See, e.g., Amy Goldstein, *Fauci worries U.S. covid-19 cases could climb to 100,000 daily*, Wash. Post (June 30, 2020), https://www.washingtonpost.com/health/fauci-worries-us-covid-19-cases-could-climb-to-100000-daily/2020/06/30/917617ba-bafc-11ea-80b9-40ece9a701dc_story.html.

⁴⁴ David Jackson, *Trump says schools should reopen because children are 'virtually immune'* (Aug. 5, 2020), <https://www.usatoday.com/story/news/politics/2020/08/05/coronavirus-trump-pushes-reopening-saying-children-immune/3297255001/>.

⁴⁵ Sam Baker, *Trump: Coronavirus is "under control"*, Axios (Aug. 4, 2020), <https://www.axios.com/trump-coronavirus-under-control-5f114a16-9952-428c-bc07-3cfa360b0977.html>.

⁴⁶ William Cummings & Courtney Subramanian, *'It is what it is,' Trump says of rising coronavirus death toll as he insists outbreak is 'under control'*, USA Today (Aug. 4, 2020), <https://www.usatoday.com/story/news/politics/2020/08/04/trump-tells-axios-rising-covid-19-death-toll-is-what-is/5579765002/>.

31. On June 24, 2020, Plaintiff submitted FOIA requests to Defendant HHS and its Components, Defendant CDC, Defendant DHS, and Defendant FEMA regarding COVID-19. These requests are incorporated by reference and attached as Exhibit D (HHS and its Components), Exhibit E (CDC), and Exhibit F (DHS and FEMA).

32. Plaintiff requested expedited processing of all of the requests on the grounds that it is an organization “primarily engaged in disseminating information” and because the records sought contain information “urgently needed to inform the public about actual or alleged government activity.” *See* Ex. D at 7-8 (citing 5 U.S.C. § 552(a)(6)(E)(v)(I)-(II)); Ex. E at 6-8 (same); Ex. C at 6-8 (same); Ex. B at 7-9 (same); Ex. A at 7-9 (same); Ex. F at 5-7 (same). Given the public health concerns at issue, Plaintiff further requested expedition on the grounds that failure to obtain the requested records on an expedited basis could “reasonably be expected to pose an imminent threat to the life or physical safety of an individual.” *See id.* (citing 5 U.S.C. § 552(a)(6)(E)(v)(I)).

33. Plaintiff requested fee waivers for all of the requests on the grounds that it is a “representative of the news media” within the meaning of FOIA, *see* Ex. D at 9 (citing 5 U.S.C. §§ 552(a)(4)(A)(ii)(II)); Ex. E at 8-9 (same); Ex. C at 8-9 (same); Ex. B at 9-10 (same); Ex. A at 9-10 (same); Ex. F at 8 (same), and that disclosure of the requested records is in the public interest because it is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* (citing 5 U.S.C. § 552(a)(4)(A)(iii)).

AGENCY RESPONSES

National Institutes of Health

34. On May 14, 2020, NIH acknowledged its receipt of Plaintiff’s request to NIH. A

copy of this correspondence is incorporated by reference and attached as Exhibit G.

35. On May 18, 2020, NIH requested that Plaintiff consolidate its request to NIH with Plaintiff's request to NIAID. A copy of this correspondence is incorporated by reference and attached as Exhibit H.

36. On May 19, 2020, Plaintiff replied to NIH, seeking to clarify that a consolidated request would capture all records responsive to both requests and stating Plaintiff would have no objection to consolidation of the requests if that were the case. Ex. H.

37. On May 19, 2020, NIH replied confirming that the consolidated request would include all records responsive to both requests. Ex. H.

38. On May 19, 2020, Plaintiff consented to the consolidation. Ex. H.

39. To date, NIH has not made a determination on Plaintiff's request as required by FOIA and has not disclosed any responsive records.

40. Plaintiff has constructively exhausted administrative remedies on account of NIH's failure to comply with the 20-day time limit for making a determination on Plaintiff's request as required by FOIA.

National Institute of Allergy and Infectious Diseases

41. On May 18, 2020, NIH, responding in part on behalf of NIAID, requested that Plaintiff consolidate its request to NIH with its request to NIAID. Ex. H.

42. On May 19, 2020, Plaintiff replied to NIH, seeking to clarify that a consolidated request would capture all records responsive to both requests and stating Plaintiff would have no objection to consolidation of the requests if that were the case. Ex. H.

43. On May 19, 2020, NIH replied confirming that the consolidated request would include all records responsive to both requests. Ex. H.

44. On May 19, 2020, Plaintiff consented to the consolidation. Ex. H.

45. To date, NIAID has not made a determination on Plaintiff's request as required by FOIA and has not disclosed any responsive records.

46. Plaintiff has constructively exhausted administrative remedies on account of NIH's failure to comply with the 20-day time limit for making a determination on Plaintiff's request as required by FOIA.

Food and Drug Administration

47. On May 1, 2020, FDA acknowledged receipt of Plaintiff's request to FDA. Ex. I.

48. On May 4, 2020, FDA requested clarification regarding whether Plaintiff's request included records for Dr. Peter Marks or Dr. Jeffrey Shuren. A copy of this correspondence is incorporated by reference and attached as Exhibit J.

49. On May 4, 2020, Plaintiff responded to that inquiry and stated that Plaintiff's request included records for both Dr. Marks and Dr. Shuren. A copy of this correspondence is incorporated by reference and attached as Exhibit J.

50. On May 5, 2020, FDA again acknowledged receipt of Plaintiff's request to FDA. In its response, FDA stated it may charge Plaintiff a fee for processing the request and that it may be unable to comply with FOIA's timeline. A copy of this correspondence is incorporated by reference and attached as Exhibit K.

51. On May 6, 2020, FDA granted Plaintiff's request for expedited processing. A copy of that correspondence is incorporated by reference and attached as Exhibit L.

52. To date, FDA has not made a determination on Plaintiff's request as required by FOIA and has not disclosed any responsive records.

53. Plaintiff has constructively exhausted administrative remedies on account of FDA's

failure to comply with the 20-day time limit for making a determination on Plaintiff's request as required by FOIA.

Department of Health and Human Services and Its Components

54. On June 25, 2020, HHS acknowledged receipt of Plaintiff's request to HHS and its Components. A copy of this correspondence is incorporated by reference and attached as Exhibit M.

55. To date, HHS and its Components have not made a determination on Plaintiff's request as required by FOIA and have not disclosed any responsive records.

56. Plaintiff has constructively exhausted administrative remedies on account of HHS and its Components' failure to comply with the 20-day time limit for making a determination on Plaintiff's request as required by FOIA.

Centers for Disease Control and Prevention

57. On June 26, 2020, CDC acknowledged receipt of Plaintiff's request and assigned it internal tracking number 20-01876-FOIA. CDC also denied Plaintiff expedited processing, stating that Plaintiff had "failed to show that there is an imminent threat to the life or physical safety of an individual" and had not "demonstrated that [Plaintiff is] a person primarily engaged in disseminating information." Citing "unusual circumstances," CDC stated that it would need more than 30 working days to respond to Plaintiff's FOIA request. A copy of CDC's June 26 letter is incorporated by reference and attached as Exhibit N.

58. Plaintiff has constructively exhausted administrative remedies on account of CDC's failure to comply with the 20-day time limit, even with a ten-day "unusual circumstances"

extension, for making a determination on Plaintiff's request as required by FOIA.⁴⁷

Department of Homeland Security and Federal Emergency Management Agency

59. On June 25, 2020, Defendant DHS responded to Plaintiff's request, acknowledging, on behalf of both DHS and FEMA, that the request was received on June 24, 2020, assigning reference number 2020-HQFO-01313, granting expedited processing, and conditionally granting the request for a fee waiver, pending a sampling of responsive documents. DHS also stated that it would invoke a ten-day extension, pursuant to 6 C.F.R. Part 5 § 5.5(c), for responding to Plaintiff's FOIA request. A copy of DHS's June 25 letter is incorporated by reference and attached as Exhibit O.

60. On June 29, 2020, DHS contacted Plaintiff to request that Plaintiff limit certain requests "to the decision makers that would shed a light on our agency's operations; that would be GS 15, the Senior Executive Services (SES), and Political Appointees (PA)[,]" citing the volume of data initially retrieved. A copy of that request for clarification is incorporated by reference and attached as Exhibit P.

61. Plaintiff provided that clarification the next day, on June 30, 2020, stating its willingness "to limit the search as [] recommend[ed,]" provided that DHS would provide a "reasonable timeline for processing responsive records." In the spirit of cooperation, Plaintiff further stated it would be willing to receive rolling productions. A copy of that reply is incorporated by reference and attached as Exhibit Q.

⁴⁷ Although Plaintiff filed an administrative appeal of CDC's denial of expedited processing, it was not required to do so. *See Judicial Watch, Inc. v. F.B.I.*, No. CIV.A. 01-1216 RBW, 2002 WL 34339771, at *3 n.5 (D.D.C. July 26, 2002) ("Congress certainly did not envision that constructive exhaustion would apply to expedited processing requests . . ."). Accordingly, Plaintiff has constructively exhausted its administrative remedies regarding CDC's denial of expedited processing.

62. To date, DHS has not acknowledged Plaintiff's willingness to limit the search, nor has DHS provided a reasonable timeline, or addressed Plaintiff's proposal for rolling productions.

63. On July 1, 2020, FEMA acknowledged that it had received Plaintiff's FOIA request on June 24, 2020, and stated that DHS would process the request and contact Plaintiff regarding its release determination. A copy of this correspondence is incorporated by reference and attached as Exhibit R.

64. On July 6, 2020, FEMA asserted that it was meeting its FOIA obligations to Plaintiff through DHS and referred Plaintiff to DHS for any additional questions. A copy of this correspondence is incorporated by reference and attached as Exhibit S.

65. On July 7, 2020, DHS issued another request for clarification and narrowing to Plaintiff, asking Plaintiff to provide more information, narrow certain timeframes "and/or provide key search terms," and "provide the specific program office and/or FEMA employees [Plaintiff] would like [DHS] to search as well as key search terms." DHS further stated that it was placing its searches on hold until Plaintiff responded. A copy of this second request for clarification is incorporated by reference and attached as Exhibit T.

66. On July 10, 2020, Plaintiff responded to DHS's July 7, 2020 request, objecting to DHS placing the searches on hold because DHS had "no reason" to do so and stating Plaintiff's expectation that the searches had been continuing. Plaintiff pointed out that DHS "did not specify which program office required more information[.]" making it difficult for Plaintiff to respond. Plaintiff stated that it would be "happy to work with [DHS] on this," but noted the obvious that "DHS and its components are in a better position to know where responsive records are located and how best to search for them." Again, in the spirit of cooperation, Plaintiff nonetheless provided suggestions and additional background, but noted the suggestions were "non-exhaustive"

and would not limit its request. A copy of this correspondence is incorporated by reference and attached as Exhibit U.

67. On July 14, 2020, DHS acknowledged that it had received Plaintiff's July 10, 2020 clarification email and would "sen[d] it over to the program office searching for responsive records." A copy of this correspondence is incorporated by reference and attached as Exhibit V.

68. To date, DHS and FEMA have not issued determinations on Plaintiff's request as required by FOIA and have not disclosed any responsive records.

69. Plaintiff has constructively exhausted administrative remedies on account of the failure of DHS and FEMA to comply with the 20-day time limit, even with the ten-day "unusual circumstances" extension for making a determination on Plaintiff's request as required by FOIA.

CAUSES OF ACTION

Violation of the Freedom of Information Act, 5 U.S.C. § 552

1. Plaintiff repeats, re-alleges, and incorporates the foregoing paragraphs as if set forth in full.
2. Defendants' failure to comply with the statutory time limit for rendering a determination on Plaintiff's FOIA requests violates 5 U.S.C. § 552(a)(6)(A)(i) and Defendants' corresponding regulations.
3. Defendants' failure to make reasonable efforts to search for records responsive to Plaintiff's requests violates FOIA, 5 U.S.C. § 552(a)(3)(C), and Defendants' corresponding regulations.
4. Defendants' failure to promptly disclose records responsive to Plaintiff's requests violates FOIA, 5 U.S.C. § 552(a)(3)(A), and Defendants' corresponding regulations.
5. The failure of Defendants HHS and its Components, CDC, NIH, and NIAID to grant Plaintiff's requests for expedited processing violates FOIA, 5 U.S.C. § 552(a)(6)(E), and Defendants' corresponding regulations.
6. The failure of Defendants HHS and its Components, FDA, NIH, NIAID, DHS, and FEMA to grant Plaintiff's request for a waiver of search, review, and duplication fees violates FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and Defendants' corresponding regulations.
7. Plaintiff has exhausted all applicable administrative remedies.
8. Plaintiff is entitled to injunctive relief with respect to the prompt disclosure of the requested documents.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- A. Expedite its consideration of this action pursuant to 28 U.S.C. § 1657(a);
- B. Order Defendants to immediately conduct a thorough search for records responsive to Plaintiff's requests;
- C. Order Defendants to immediately process any responsive records for disclosure and produce such records to Plaintiff;
- D. Enjoin Defendants HHS and its Components, FDA, NIH, NIAID, DHS, and FEMA from charging Plaintiff search, review, and duplication fees relating to the requests;
- E. Award Plaintiff its costs and reasonable attorneys' fees incurred in this action; and
- F. Grant such other relief as the Court may deem just and proper.

Dated: August 12, 2020
Washington, D.C.

Respectfully submitted,

/s/ Mark F. Mendelsohn

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